No. 17-6086

IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Sex Offender Registration and Notification Act's delegation to the Attorney General in 34 U.S.C. § 20913(d) (formerly 42 U.S.C. § 16913(d)) violates the constitutional nondelegation doctrine.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A (recodified at 18 U.S.C. § 3599), and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit, volunteer organization whose membership comprises attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the NAFD is to promote the interests of justice by appearing as amicus curiae in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. NAFD has appeared as amicus curiae in numerous cases challenging Congress's power to enact criminal provisions or statutes affecting criminal offenders, including *United States v. Comstock*, 560 U.S. 126 (2010), and *Jones v. United States*, 529 U.S. 848 (2000). Each year, federal defenders represent tens of thousands of individuals in federal court, including hundreds who are subject to the registration requirements of SORNA. Federal defenders have challenged Congress's Commerce Clause authority to enact SORNA in hundreds of cases. *See, e.g.*, *United States v. Whaley*, 577 F.3d 254 (5th Cir. 2009); *United States v. Gould*, 568 F.3d 459 (4th Cir. 2009); *United States v. May*, 535 F.3d 912 (8th Cir. 2008).

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Letters of consent to the filing of this *amicus* brief from counsel for Petitioner and Respondents are on file with the author.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question certified in this case is whether Congress's delegation to the Attorney General to decide questions regarding the retroactivity of the Sex Offender Registration and Notification Act (SORNA) violates the Constitution's nondelegation doctrine. Amicus contends that, within that question, is another one: whether Congress had the constitutional authority, in the first instance, to require individuals like Mr. Gundy to register as sex offenders. Amicus contends that the sex-offender registration requirement that led to Mr. Gundy's conviction is not a proper exercise of Congress's Commerce Clause authority. Although this issue was not raised in the court of appeals, or explicitly articulated in the petition's framing of the issue, it is fairly included in the certified issue. *See* Supreme Court Rule 14.1(a). In addition, this Court has recognized that, even apart from its rules, it may consider issues that have not been preserved in the court of appeals or certified by this Court itself. *Vance v. Terrazas*, 444 U.S. 258 n.5 (1980); *see also Teague v. Lane*, 489 U.S. 288, 300 (1989) (considering issue presented only in amicus brief). Congress's authority to enact SORNA's registration requirement and criminal penalties is fairly included in the delegation question certified in this case. Congress cannot delegate power it does not legitimately possess. Thus, the question falls within that certified by this Court. *See Ohio v. Robinette*, 519 U.S. 33, 38–39 (1996).[2]

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2. The question presented by amicus is a significant one: hundreds of defendants every year are sentenced in federal court for failing to register as sex offenders. In 2016 alone, 425 persons were sentenced under the failure-to-register guideline. U.S. Sentencing Comm'n, "Use of Guidelines and Specific Offense Characteristics,

In SORNA, Congress requires that all persons convicted of a "sex offense" place their name on a state registry.[3] Failure to comply is an element of a federal offense. Amicus argues that Congress's registration requirement exceeds its enumerated authority and must be stricken.

The Commerce Clause does not empower Congress to require defendants convicted of purely local offenses under state law to register as sex offenders. SORNA's registration requirement does not regulate within any of three categories of commercial activity this Court has identified as permissible subjects of regulation. It plainly does not regulate the channels of interstate commerce or the instrumentalities or people in commerce.

Nor does SORNA regulate activities that substantially affect commerce. Even in its broadest reading of this category of commerce, this Court has required that the activity regulated be economic in nature. SORNA's registration requirement has no commercial character.

Nor did Congress identify a jurisdictional hook or make findings that might assist this Court in connecting the registration requirement to interstate commerce. The provision criminalizing registration offenses, 18 U.S.C.

Offender Based, Fiscal Year 2016," located at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2016/Use_of_SOC_Offender_Based.pdf (last accessed May 20, 2018).

3. The Adam Walsh Act, originally 42 U.S.C. §§ 16901-16962, was transferred to 34 U.S.C. §§ 20901-20962, effective September 1, 2017. *See* http://uscode.house.gov/editorialreclassification/t34/index.html.

§ 2250, contains a scant jurisdictional element—punishing those who fail to register and travel in commerce or were convicted of federal, District of Columbia, or tribal offenses. 18 U.S.C. §2250(a)(2)(A), (B). But there is no "hook" in the provision creating the pool of potential offenders. Indeed, in articulating a purpose for the sex offender registry, Congress did not even attempt to identify any relationship to interstate commerce. It said only that it aimed to "protect the public from sex offenders and offenders against children." 34 U.S.C. § 20901.

To be sure, Congress has broad authority to enact legislation that is "necessary and proper" to the exercise of its enumerated powers. This "necessary and proper" power cannot justify SORNA's registration requirements.[4] These requirements are not incidental to any legitimate exercise of Congress's commerce power. Instead, the registry is a predicate for Congress's attempt to expand its police power under the guise of legitimate Commerce Clause legislation. As the Chief Justice has observed, Congress may not create the activity that it seeks to regulate under its commerce authority.

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4. The Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh circuits have upheld SORNA's registration requirement as necessary and proper to Congress's commerce power. But four federal district courts have held that the requirement has no constitutional support. *See United States v. Myers*, 591 F. Supp. 2d 1312 (S.D.Fla. 2008), *vacated*, 534 F.3d 1349 (11th Cir. 2009) (per curiam); *United States v. Hall*, 577 F. Supp. 2d 610, 622 (N.D.N.Y. 2008), *rev'd*, *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010); *United States v. Waybright*, 561 F. Supp. 2d 1154 (D. Mont. 2008), *disapproved of*, *United States v. George*, 625 F.3d 1124 (9th Cir. 2010); *United States v. Powers*, 544 F. Supp. 2d 1331 (M.D. Fla. 2008), *vacated*, 562 F.3d 1342 (11th Cir. 2009).

In enacting national registration requirements for local criminal convictions that have no connection with commerce, Congress has impermissibly reached into an area reserved for the States to regulate. Even when Congress has articulated sound policy for such broad regulation, this Court has intervened to ensure that Congress does not exploit its Commerce Clause authority to regulate "all private conduct." The Court should similarly intervene here and strike the registration requirement.

The statute under which Mr. Gundy is convicted applies only to defendants who are "required to register under the Sex Offender Registration and Notification Act." 18 U.S.C. § 2250(a)(1). Congress could not constitutionally require Mr. Gundy, who was convicted of a Maryland offense, to register under SORNA. Since Congress lacks the power to require Mr. Gundy to register in the first place, § 2250(a) is unconstitutional.

ARGUMENT

I. Congress's Commerce Clause Power Does Not Support SORNA's Sweeping Exercise of Police Power

The Constitution creates a federal government "acknowledged by all to be one of enumerated powers." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819); *see also Gibbons v. Ogden*, 22 U.S. 1, 195 (1824) (observing "[t]he enumeration presupposes something not enumerated"). This Court has been mindful of James Madison's observation regarding the allocation of powers under our Constitution: "the powers delegated by the

proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting The Federalist No. 45, pp. 292-93 (C. Rossiter ed. 1961)). This principal of federalism preserves liberty: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Among the enumerated powers delegated to the federal government is the authority granted in the Commerce Clause. That provision allows Congress "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. Although this power has been invoked to support federal incursions into policing crime, this Court has insisted that the authority must focus on commerce's economic nature. Indeed, in *Lopez*, Justice Kennedy rejected Congress's reliance on the Commerce Clause to regulate "an activity beyond the realm of commerce in the ordinary and usual sense of that term" because exercising authority in that way foreclosed "the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). In the same case, Justice Thomas wrote, "we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that

there are real limits to federal power. . . . The Federal Government has nothing approaching a police power." *Id.* at 584 (Thomas, J., concurring) (emphasis in original).

Since 2007, the Government has defended the sweeping exercise of congressional power reflected in SORNA's registration and criminal provisions as a valid exercise of its authority under the Commerce Clause. SORNA does not itself explain under what authority Congress imposes its registration requirements. The requirements neither contain a jurisdictional element nor regulate commerce. Likewise, they do not, on their face, regulate interstate commerce. The courts have "assumed that Congress has invoked its Commerce Clause power" to enact the registration requirement. *Myers*, 591 F. Supp. 2d at 1331. Congress has given no indication rebutting that assumption. But the widely acknowledged constitutional support for the requirement is insufficient. A long history of Commerce Clause jurisprudence makes clear that Congress does not have the power to regulate individuals convicted of purely intrastate offense. Therefore, SORNA is an improper exercise of the commerce power. *Lopez*, 514 U.S. 549; *United States v. Morrison*, 529 U.S. 598 (2000); *Jones v. United States*, 529 U.S. 848 (2000).

From the beginning of its Commerce Clause jurisprudence, the Court was careful to note that the term "commerce" did not authorize unlimited power. Rather, it was a term with a discrete meaning: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by the prescribing rules for carrying on that intercourse." *Gibbons*, 22

U.S. at 189–90. To determine whether Congress's acts are properly tethered to this meaning, the Court "has identified three broad categories of activity that Congress may regulate under its commerce power." *Morrison*, 529 U.S. at 608–609 (internal quotation marks omitted). First, Congress may regulate the use of and channels of interstate commerce, such as interstate highways, the mail, or air traffic routes. *Id.* Second, Congress may regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce. *Id.* Finally, Congress can regulate those activities that have a substantial effect on interstate commerce. *Id.* The registration requirements cannot be upheld under the first two categories: they have nothing to do with the channels of interstate commerce, and they are imposed on individuals who need not have engaged in interstate commerce or even have any connection to commerce. The registration requirements can therefore be upheld only if they regulate "those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558–59; *see also United States v. Robertson*, 514 U.S. 669 (1995) (per curiam) ("The 'affecting commerce' test was developed in our jurisprudence to define the extent of Congress's power over purely *intra*state commercial activities that nonetheless have substantial *inter*state effects.") (emphasis in original); *Waybright*, 561 F. Supp. 2d at 1164 (Government initially relied on "substantially affects commerce" basis to argue registration requirement fell within commerce power). Even under this Court's broadest application of the "substantially affects" category, the registration requirement fails.

Lopez and *Morrison* set forth several factors to analyze whether a regulation can be upheld as an activity

that substantially affects interstate commerce. *Lopez*, 514 U.S. at 559–63; *Morrison*, 529 U.S. at 610–13. None of those factors supports the registration requirement.

First, the regulated activity must be economic in nature. This factor is decisive and central to Commerce Clause authority. *Morrison*, 529 U.S. at 611 ("*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."). The requirement that the activity be economic has sometimes stymied Congress's attempts to pass statutes addressing crime. *See, e.g.*, *Morrison*, 529 U.S. at 598 (striking civil penalties for violence-against-women offenses); *Lopez*, 514 U.S. at 549 (striking statute criminalizing gun possession near schools). Congress has "broad authority" to create crimes—*United States v. Comstock*, 560 U.S. 126, 135–36 (2010)—but only when exercising its enumerated powers. Otherwise, this Court has emphasized that the "States possess primary authority for defining and enforcing the criminal law." *Lopez*, 514 U.S. at 560 n.3 (internal quotation marks omitted). To ensure that the primary power rests firmly with the States, the Court has carefully examined Congress's assertion of commerce power in this area. In *Lopez*, for example, the Court struck the Gun-Free School Zones Act because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus." 514 U.S. at 559–60. The Act "by its terms has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561. Similarly, in *Morrison*, Congress

created a federal civil remedy for victims of gender-motivated crimes of violence. 529 U.S. at 605. This Court struck that provision because it did not regulate economic activity. *Id.* at 613.

Congress's attempt to police sex offenders should be similarly circumscribed. Congress "remain[s] unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 614 (Ginsburg, J., concurring in part, dissenting in part) (*NFIB*) (citing *Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 617–19). SORNA's registration requirements have no commercial character nor any relation to economic activity of any kind. This conclusion is evident simply from a reading of the statute itself. The "Declaration of Purpose" informs that SORNA was enacted "to protect the public from sex offenders and offenders against children." 34 U.S.C. § 20901. That purpose does not address economic activity. Congress has no power to exercise a broad police power to protect the public. *See United States v. Kebodeaux*, 570 U.S. 387, 402 (2013) (Roberts, C.J., concurring) (noting Court's longstanding resistance to assertions of congressional power to protect the public). Because the registration requirement has "nothing to do with commerce," it cannot be supported as a lawful exercise of Congress's Commerce Clause power. *Lopez*, 514 U.S. at 560 (quotation marks omitted); *see also Morrison*, 529 U.S. at 614 (Court has upheld federal regulation of intrastate activity "only where that activity is economic in nature").

The second factor examined in *Lopez* and *Morrison* is whether the statute contains a "jurisdictional element,"

such as a requirement of travel across state lines for the purposes of committing the regulated act. *Morrison*, 529 U.S. at 611–12. The registration requirements contain no such jurisdictional element. 34 U.S.C. §§ 20913-20916. Instead, the registration requirements, unlike the provision criminalizing the failure to comply with them, apply to offenders whose criminal activities are purely intrastate. *See Waybright*, 561 F. Supp. 2d at 1165; 18 U.S.C. § 2250(a). Under this Court's precedent, an express jurisdictional element "might limit [the provision's] reach to a discrete set of [sex offenders] that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 561–62. For example, a requirement that persons who were first convicted of a local sex offense and then traveled in interstate commerce must register would come closer to the mark. *Id.* at 561 (recognizing that § 922(q) lacked any jurisdictional element to ensure "case-by-case inquiry" into commerce nexus). Congress, however, made no attempt to constrain its registration reach to activity connected to interstate commerce.

Legislative findings are another factor courts consider in assessing Commerce Clause authority. Findings demonstrating a connection to commerce will at least enable a court "to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce." *Lopez*, 514 U.S. at 563.[5] Congress included

5. Legislative findings do not guarantee that the statute will be upheld as a valid exercise of congressional power. The Violence Against Women Act, at issue in *Morrison*, was accompanied by "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families." *Morrison*, 529 U.S. at 614. The Court still struck down the statute, ruling that "the existence of congressional findings is not sufficient, by itself,

such findings in other sections of the Adam Walsh Act. For example, Title V of the Act, entitled "Child Pornography Prevention," contains findings that "intrastate incidents of production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the transfer of custody of children for the production of child pornography, have a substantial and direct effect upon interstate commerce . . . ." Pub. L. No. 109-248, tit. V, sec. 501, 109 Stat. 587, 623. Title I of SORNA, including its registration requirement, contains no such findings. *Id.* at Tit. I. Like the Gun Free School Zone Act, *Lopez*, 514 U.S. at 562-63, SORNA is unsupported by legislative findings indicating that purely local sex crimes have any link with interstate commerce: "SORNA's legislative history contains no express congressional findings regarding the effects of sex offender registration on interstate commerce." *Waybright*, 561 F. Supp. 2d at 1165.

Congress may not compel registration in anticipation of possible interstate travel. In *NFIB*, the Government argued that requiring individuals to purchase health insurance was proper under the Commerce Clause because everyone, at some point, is a consumer of health care. *Nat'l Fed. of Indep. Bus.*, 567 U.S. at 557 (Roberts, C.J.). Five justices rejected projected economic future

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to sustain the constitutionality of Commerce Clause legislation." *Id.* Rather, the Court instructed the determination of whether an activity sufficiently affects interstate commerce is for the judiciary. *Id.* "Moreover, although the statute was supported by express congressional findings regarding the effects upon interstate commerce of gender-motivated violence, the congressional findings relied on the same 'cost of crime' and 'national productivity' arguments the Court rejected in *Lopez*." *Waybright*, 561 F. Supp. 2d at 1164 (citing *Morrison*, 529 U.S. at 614–15).

activity as the basis for Commerce Clause authority. As Chief Justice Roberts wrote, "The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. . . . Each one of our cases . . . involved pre-existing economic activity." *Id* (citations omitted) (Roberts, C.J.); *see also id.* at 657 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) ("But if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end."). In just the same way, Congress may not dictate registration based on predictions of travel or other speculated effects on interstate commerce.

Finally, this Court will examine the extent of the relationship between the regulated activity and its effects on commerce. *Morrison*, 529 U.S. at 612. Of course, the closer the connection, the more likely the Court will find that that Congress has not tread into an area reserved for state regulation. *See id.* (connection cannot be attenuated). Here, there is no indication in the statute, or anywhere else, that offenders subject to the registration obligation imposed by SORNA have any effect on commerce at all, not even an attenuated one. Rather, the registration requirements regulate "a person who is a sex offender without reference to any activity affecting—or not affecting—interstate commerce that he may undertake." *Myers*, 591 F. Supp. 2d at 1335.

SORNA's registration requirements exceed even the broadest permissible conception of Congress's authority over interstate commerce. At the furthest boundary of its power, Congress may regulate purely intrastate economic

activity if that activity, in the aggregate, would have a substantial effect on interstate commerce. *Wickard*, 317 U.S. at 125; *accord Gonzalez v. Raich*, 545 U.S. 1 (2005). In *Wickard*, this Court famously upheld a federal provision prohibiting an Ohio farmer from growing wheat on his own property, for his own consumption. *Wickard*, 317 U.S. at 114. It did so based on the principle that purely intrastate activity may, when aggregated, have a substantial effect on interstate commerce. *Id.* at 128–29. That decision has "always has been regarded as the ne plus ultra of expansive Commerce Clause jurisprudence." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 648 (Scalia, Kennedy, Thomas, Alito, J.J., dissenting); *see also Lopez*, 514 U.S. at 560 (*Wickard* "is perhaps the most far reaching of Commerce Clause authority over intrastate activity").

But, as far as Congress reached, it did not reach outside the bounds of economic activity. *Wickard*, 317 U.S. at 125 (Congress may regulate activity that "exerts a substantial economic effect on interstate commerce"); *Lopez*, 514 U.S. at 560 (*Wickard* "involved economic activity"). *Wickard* represents the outmost limit of Congress's authority in this category: Congress may be able to regulate purely intrastate economic or commercial activity if that activity, when aggregated, substantially affects interstate commerce. *Id.*; *see also Morrison*, 529 U.S. at 617 (rejecting the application of the aggregation principle to intrastate non-economic activity). *Lopez* emphasized that the *Wickard* aggregation principle

> may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate

> the distinction between what is national and what is local and create a completely centralized government.

Lopez, 514 U.S. at 556–57 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

An effect on commerce cannot be reached by extrapolating the aggregate economic effects that sex crimes and sex offenders inflict upon society. The Court has flatly rejected the notion that Congress can regulate noneconomic intrastate criminal conduct based solely on the purported aggregate effect on interstate commerce. *Morrison*, 529 U.S. at 617. Nor can the "costs of crime" or the effects of crime on "national productivity" support the use of the Commerce Clause to regulate intrastate criminal activity. *Lopez*, 514 U.S. at 563-64; *Morrison*, 529 U.S. at 598, 612–13. In *Lopez*, the government maintained that school-zone firearm possession would increase the cost of insurance, inhibit interstate travel, and hinder education. 514 U.S. at 563–64. "The Court rejected these attenuated effects recognizing that acceptance of the argument would grant Congress unlimited power under the Commerce Clause." *Lopez*, 514 U.S. at 563–64; *Waybright*, 561 F. Supp. 2d at 1164 (citing *Lopez*).

The Court's most recent application of the aggregation doctrine, in *Taylor v. United States*, 136 S. Ct. 2074 (2016), does not bring SORNA within Congress's authority. *Taylor* addressed the nature of the evidence required to prove the commerce element under the Hobbs Act, 18 U.S.C. § 1951(a), in a case involving robbery of drug proceeds. 136 S. Ct. at 2077–78. Ten years earlier, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court had

decided that Congress had the power to regulate the "national market for marijuana," through the Controlled Substance Act (CSA), based on its "aggregate effect on commerce." *Taylor*, 136 S. Ct. at 2077–78. Relying on *Raich*, the *Taylor* Court noted that "the sale of marijuana is undoubtedly an "economic activity," and held that, if Congress had the power to regulate its market, it also had the power to regulate robberies within that market. *Id.* at 2080.

This conclusion is consistent with the limit established by *Wickard*. Because marijuana is a commodity that has an interstate market, the CSA is connected to "economic" activity and is therefore a valid exercise of Congress' Commerce Clause powers:

> Unlike those at issue in *Lopez* and *Morrison* the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.

Raich, 545 U.S. at 25–26. Commerce is crucial to the constitutionality of a regulatory scheme that purports to regulate intrastate conduct: when "a general regulatory statute bears a substantial relation to commerce, the *de*

minimis character of individual instances arising under that statute is of no consequence." *Id.* at 23 (quoting *Lopez*, 514 U.S. at 558); *see also Myers*, 591 F. Supp. 2d at 1334; *Waybright*, 561 F. Supp. 2d at 1166.

SORNA's registration requirement does not regulate economic activity, nor does it regulate channels of interstate commerce. SORNA's registration requirement is not economic or commercial in any sense, not individually and not in the aggregate. Its aim is to exercise federal police power under the aegis of protecting the public, and it attempts to do so by regulating individual, intrastate activity that stands completely apart from interstate commerce. Not even the most expansive application of the Commerce Clause power supports it.

II. The Registration Requirement Is Not Necessary and Proper to Congress's Exercise of Its Commerce Power.

The "Necessary and Proper Clause" extends Congress's authority to act in furtherance of executing its enumerated powers. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 537. The clause, however, is not without limits, and Congress exceeded them in enacting SORNA's registration requirement.

Any exercise of the Necessary and Proper Clause must be an exercise "of authority derivative of, and in service to, a granted power." *Id.* at 560 (Roberts, C.J.). This Court looks to determine whether the exercise is "narrow in scope," or "incidental" to the commerce power. *See id.* The power exercised here is neither narrow nor incidental. *See United States v. Thomas*, 534 F. Supp. 2d

912, 921–22 (N.D. Iowa 2008) (while upholding registration requirement under Necessary and Proper Clause, noting that it was not "narrowly tailored or absolutely necessary" to Congress's ability to monitor sex offenders). The registration requirement is certainly not narrow. It is not imposed "in a small fraction" of cases, as was the power addressed in *Comstock*, 560 U.S. at 148 (federal prisoners held beyond their sentences for mental health reasons in a fraction of cases). Rather, every person convicted of a sex offense must register—regardless whether they have traveled in commerce. 34 U.S.C. § 20913.

Nor is the registration requirement "incidental" to Congress's Commerce Clause power.[6] The registry was not created as an ancillary or logically derivative support for Congress's exercise of commerce authority; instead, it was enacted to create the necessary predicate to the exercise of its power. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 560 (Roberts, C.J.). In *NFIB*, Congress imposed a requirement on all individuals to purchase health insurance. Congress did not, as it does when it properly exercises its authority under the Necessary and Proper Clause, "regulate under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation." *Id.* Rather, Congress brought people within that sphere, whether they chose to be there or not. *Id.* By contrast, the local cultivation of marijuana addressed in *Raich* was a means to an appropriate federal end under the Commerce Clause—the

6. In *United States v. Kebodeaux*, this Court concluded that the civil registration requirement was necessary to Congress's power to regulate the military–a different power than that at issue here. 570 U.S. at 395.

regulation of a national market in fungible commodities. 545 U.S. at 19.

Registration under SORNA is not a means to an end, "it *is* the end of SORNA." *Waybright*, 561 F. Supp. 2d at 1166 (emphasis added). To achieve the goal of registering all sex offenders, Congress impressed upon the States a policy determination traditionally left to them. Congress assumed a federal police power to determine how to best protect the public against sex offenders, displacing the States in an area they have long regulated. Then, under § 2250 and its jurisdictional hook, Congress has sought to enforce the requirement by criminalizing the failure to act. As *NFIB* illustrates, the registration may be a "necessary" predicate to the criminal provision, but it is not a proper one. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 560 (Roberts, C.J.)

Local sex offender registration is not economic activity. The registration provision "has nothing to do with commerce or any sort of economic enterprise; it regulates purely local, non-economic activity." *Waybright*, 561 F. Supp. 2d at 1164. "It is impossible to read SORNA ... as regulating an economic market." *Myers*, 591 F. Supp. 2d at 1332. Accordingly, the registration requirement must be stricken.

III. The Broad Power Exercised in Enacting SORNA Upsets the Balance of State and Federal Authority.

Federalism—the idea that the power ceded by the people is exercised by two, distinct governments—was of preeminent importance to our Founders: "In the compound republic of America, the power surrendered by the people

is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will control itself." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison), *cited in Lopez*, 514 U.S. at 576. Under principles articulated by this Court, SORNA's registration requirement, untethered to any of Congress's enumerated powers, violates this allotment of power.

Section 20913 compels activity: a federal requirement for Mr. Gundy to register as a sex offender for being convicted of a Maryland state crime. In *NFIB*, the opinions of Chief Justice Roberts and Justice Scalia, joined by Justices Kennedy, Thomas, and Alito, recognized that a law compelling, as SORNA does, non-economic activity cannot be justified as an exercise of Congress's Commerce Clause Power. 567 U.S. at 549, 552 (Roberts, C.J.); *id.* at 649 (Scalia, Kennedy, Thomas and Alito, J.J., dissenting). It follows that Congress cannot use its Commerce Clause powers to compel those convicted of state sex offenses to act.

Section 20913 attempts to do what Chief Justice Roberts rejected in *NFIB*: it demands that individuals register as sex offenders for state crimes. "Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority." *Id.* at 552 (Roberts, C.J.). Section 20913's registration requirement improperly "vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power." *Id.* at

560 (Roberts, C.J.). Congress cannot "regulate commerce that does not exist by compelling its existence." *Id.* at 649 (Scalia, Kennedy, Thomas, and Alito, J.J., dissenting). "[I]t must be activity affecting that commerce that is regulated, and not merely the failure to engage in commerce." *Id.* at 658. Section 20913 does not regulate existing economic activity; it forces individuals convicted of purely state offenses to register (the activity) for the sole purpose of creating the federal crime of failing to register.[7] The Commerce Clause does not authorize such congressional overreach; otherwise, it would "extend federal power to virtually everything." *Id.* at 657. Sex offense registration, or non-registration, cannot be defined as economic activity. There is no market for sex offenders. "Such a definition of market participants is unprecedented, and were it to be a premise for the exercise of national power, it would have no principled limits." *Id.*; *contrast Raich*, 545 U.S. at 45.

Sex offender registration originated in the states. *See* Wayne A. Logan, "Criminal Justice Federalism and National Sex Offender Policy," 6 OHIO ST. J. CRIM. L. 51, 60–62 (2008) (describing history of registration laws). Indeed, SORNA implicitly recognizes that the power properly rests with the states, by commanding compliance with state registries. 34 U.S.C. § 20913(a); *cf. Lopez*, 514 U.S. at 584 (Thomas, J., concurring) ("we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power") (emphasis in original). It upsets the

7. Section 20913 was not designed to create a discrete federal crime. In subsection (e), Congress specifically told states to create the penalty for failing to register. Implicit is congressional awareness of its own limitations and the traditional role and rights of states to enforce police powers.

balance of powers between the two governments for Congress to usurp police power reserved for the states by ordering registration, an activity (or non-activity) that is non-commercial and has no economic consequence. *Id.* at 583. (Kennedy, J., concurring) ("The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.").

In SORNA, Congress regulates a wide swath of behavior that properly falls within the states' power to regulate. It requires, as a federal matter, individuals who are "sex offenders" to register and maintain current information in each local jurisdiction: (a) where the sex offender was convicted, (b) where the sex offender resides, (c) where the sex offender is employed, and/or (d) where the sex offender attends school. 34 U.S.C. § 20913(a). It requires that the individual register prior to his release from prison, or if he was not imprisoned, no later than three business days after sentencing. *Id.* at § 20913(b). And it mandates that the offender update registration within three days after a change in name, residence, employment or student status. *Id.* at § 20913(c). It imposes requirements on the states that intrude, as a federal matter, on offenders' privacy interests. It requires, for example, that every state establish an internet website, publishing information about sex offenders registered in that state, that each jurisdiction include in the design of its own website all field search capabilities needed for full participation in the National Sex Offender Public Website, and that each jurisdiction "participate in that website as provided by the Attorney General." *Id.* at

§ 20920(a). Congress may have good reasons for making these policy choices, but blurring or, as here, discarding, the lines drawn by the Founders in creating a system of dual sovereignty is impermissible:

> "[E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Id.* at 556–557 (quoting *Jones & Laughlin Steel*, supra, at 37, 57 S. Ct. 615).

Lopez, 514 U.S. at 557; *see also Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 538 (Court's respect for Congress's policy decisions cannot extend to ignoring restraints on federal power). "Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

Imposing a federal obligation to register threatens federalism and the constitutional "order because it gives such an expansive meaning to the Commerce Clause that

all private conduct (including failure to act) becomes subject to federal control, effectively destroying the Constitution's division of governmental powers." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 658 (Scalia, Kennedy, Thomas Alito, J.J., dissenting). The Commerce Clause does not permit Congress to require defendants convicted of purely state offenses to register as sex offenders. The registration requirements contained in 34 U.S.C. §§ 20913-20918 are unconstitutional. The statute under which Mr. Gundy is convicted applies only to defendants who are "required to register under the Sex Offender Registration and Notification Act." 18 U.S.C. § 2250(a)(1). Since Congress lacks the power to require Mr. Gundy to register in the first place, § 2250(a) is likewise unconstitutional. *See Ward v. Illinois*, 431 U.S. 767, 774 (1977) (unconstitutional statute cannot serve as predicate for conviction).

CONCLUSION

By compelling individuals who have no connection to commerce to register or be subject to a federal conviction, Congress has exceeded its authority. Because Congress had no authority to exercise the power it has improperly delegated, SORNA's registration requirements should be stricken.

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